

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

01/17/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000144

FILED: _____

STATE OF ARIZONA

MARIA C BREWER

v.

JAMES WILLIAM CHARBONEAU

MICHAEL A BURKHART

CHANDLER CITY-MUNICIPAL COURT
REMAND DESK CR-CCC

MINUTE ENTRY

CHANDLER CITY COURT

Cit. No. #126393

Charge: 1. PUBLIC SEXUAL INDECENCY

DOB: 07/26/55

DOC: 03/14/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A). This case has been under advisement and the Court has considered and reviewed the record of the proceedings from the Chandler City Court and the memoranda submitted by counsel.

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Appellant was tried for Public Sexual Indecency after exposing himself to an off-duty police officer when both parties were in their respective vehicles. During the course of the police investigation into this incident, the investigating officer questioned Appellant, who confessed to committing the act in question. At trial, Appellant alleged this was made under duress and requested that the trial court give the voluntariness instruction from the Arizona Revised Jury Instructions -- Criminal (RAJI) numbered Standard Criminal 6, requiring proof of voluntariness beyond a reasonable doubt. Instead, the trial court gave an instruction that the State's burden of proof was by a preponderance of the evidence.

Prior to trial, Appellant requested a subpoena duces tecum for the personnel file of the complainant. At the hearing on this request, Appellant stated that he wished the trial court to conduct an in camera inspection of the complainant's file for evidence of untruthfulness. When the trial court denied the subpoena duces tecum, Appellant contacted the complainant's employer, the Ak-Chin Police Department, directly and tried unsuccessfully to obtain the personnel file under the federal Freedom of Information Act.

The day before the trial, Appellant tried to obtain a continuance of the trial in order to make arrangements for an expert witness to testify on his behalf. Appellant alleged that, approximately one month prior to trial, he discovered he suffered from a medical condition. Appellant claimed that this condition caused the incident leading to Appellant's arrest.

Appellant alleges the trial court erred in several respects: (1) in reading a voluntariness instruction with a burden of proof of preponderance of the evidence rather than the reasonable doubt standard supplied by RAJI, (2) in denying his subpoena of the complainant's personnel file, and (3) in denying his request for a continuance.

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1. Standard of Review

The standard of review for motions to continue¹ and for subpoenas² is that of abuse of discretion. A trial judge abuses his discretion where his ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."³ An appellate court must review all evidence in the light most favorable to affirming the trial court's ruling⁴ and must defer to the trial court's judgment if the evidence reasonably sustains that decision.⁵ Jury instructions, on the other hand, must be reviewed by determining whether, considered as a whole, they would mislead the jury as to the proper rules of law.⁶

2. Voluntariness Jury Instruction

Appellant claims that the trial court's decision to read a voluntariness instruction with a burden of proof of preponderance of the evidence rather than reasonable doubt constitutes fundamental error. Alternatively, Appellant states that this decision was prejudicial to his rights. The proposed jury instruction offered by Appellant clearly states that the burden of proof concerning the voluntariness of a confession is that of reasonable doubt. However, the Arizona Supreme Court has held that, on the issue of voluntariness of a confession, the state's burden of proof is by a preponderance of the evidence.⁷ In Smith, the Arizona Supreme Court clearly has overruled the prior case law upon which the sample jury instruction relied upon by Appellant was based. The trial court

¹ State v. Ashelman, 137 Ariz. 460, 465, 671 P.2d 901 (1983).

² Schwartz v. Superior Court in Maricopa County, 186 Ariz. 617, 619, 925 P.2d 1068 (App. 1996).

³ Quigley v. City Court of the City of Tucson, 132 Ariz. 35, 37, 643 P.2d 738 (1982).

⁴ Paul Schoonover, Inc. v. Ram Construction, Inc., 129 Ariz. 204, 205, 630 P.2d 27 (1981); Gann v. Morris, 122 Ariz. 517, 18, 596 P.2d 43 (App. 1979), Lawrence v. VNB, 12 Ariz App. 51, 57, 467 P.2d 763 (1970).

⁵ Greenough v. Reid, 12 Ariz. App. 167, 170, 468 P.2d 618 (1970).

⁶ Rodriguez v. Schlittenhart, 161 Ariz. 609, 614, 780 P.2d 442 (App. 1989), citing Kuhnke v. Textron, Inc., 140 Ariz. 587, 592, 684 P.2d 159, 164 (App. 1984).

⁷ Arizona v. Smith, 193 Ariz. 452, 974 P.2d 231 (1999).

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gave the jury the proper rule of law for the issue of the voluntariness of a confession: by a preponderance of the evidence. Therefore, the trial court did not err in reading an instruction with this standard of proof.

3. Personnel File Subpoena

Appellant next alleges that the trial court erred in denying its request for a subpoena and in camera inspection of the complainant's personnel record. As Appellant correctly points out, the United States Ninth Circuit Court of Appeals has held that a trial court must inspect in camera the personnel files of police officers testifying as witnesses.⁸ However, Arizona courts have specifically declined to follow Henthorn.⁹ Instead, the rule in Arizona is that the defendant must meet a threshold showing of materiality.¹⁰ The trial court stated at the hearing that Appellant's request for information from the complainant's personnel file appeared to be little more than a "fishing expedition"¹¹ and Appellant has not provided any evidence to the contrary. The fact that the complainant, while a police officer, was not the arresting officer and was not testifying in her official capacity, also impacts the immateriality of Appellant's request. This Court concludes that the trial court did not abuse its discretion in denying Appellant's subpoena and in camera inspection requests.

4. Appellant's Motion to Continue

Appellant also alleges that the trial court abused its discretion by refusing to grant Appellant's Motion for a Continuance. As noted in State v. Ashelman¹², "[a] motion to continue is not granted as a matter of right. Such motion will be granted only if in the discretion of the trial court

⁸ United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991).

⁹ State v. Acinelli, 191 Ariz. 66, 70-71 (App. 1997).

¹⁰ Id. at 71.

¹¹ See R.T. of January 16, 2001, at p. 6, ll. 17-21.

¹² Supra.

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circumstances exist making delay indispensable to the interests of justice."¹³ In Ashelman, as here, the movant knew of the circumstances requiring a continuance in advance, but did not request a continuance until the eve of the trial.¹⁴ Appellant admits that he first knew of his back problem approximately one month before the trial date.¹⁵ However, he did not request the continuance until the day before the trial. Given this short notice, the trial court did not abuse its discretion in denying the motion to continue.

IT IS THEREFORE ORDERED affirming the judgment of guilt and sentence of the Chandler City Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Chandler City Court for all further and future proceedings.

¹³ 137 Ariz. at 465. (citing State v. Laffoon, 125 Ariz. 484, 485-86, 610 P.2d 1045, 1046-47 (1980)).

¹⁴ Id.

¹⁵ Appellant's Memorandum at 3.